

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
ROMAN TERESHCHENKO, :
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Petitioner, : 23cv2006 (DLC)
:
-v- : OPINION
:
YASAMIN KARIMI, : AND ORDER
:
Respondent. :
:
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APPEARANCES:

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DENISE COTE, District Judge:

The respondent seeks a stay pending appeal of the January 8, 2024 Opinion and Order ("January 8 Order") granting the petition filed by Roman Tereshchenko ("Tereshchenko" or the "Father") pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (the "Hague Convention"). For the following reasons, the request for a stay is denied except to the following extent. An administrative stay shall be issued for three days to permit the respondent to seek a stay from the Court of Appeals for the Second Circuit.

Background

Tereshchenko filed this Hague Convention petition on March 8, 2023, seeking the return of his two children, who had been abducted by their mother, respondent Yasamin Karimi ("Karimi" or the "Mother"), in 2021. The January 8 Order describes the relevant facts, which are summarized here. Tereshchenko v. Karimi, No. 23cv2006(DLC), 2024 WL 80427 (S.D.N.Y. Jan. 8, 2024). Familiarity with the January 8 Order is assumed.

The children, M.T. and K.T., who are now seven and six years of age, were habitual residents of Ukraine. Their parents, who are Ukrainian citizens, are divorced. After the Children's Service of Odesa City Council determined on October 11, 2021 that the children were to reside with Tereshchenko

("Guardianship Decision"), Karimi abducted the children and took them to an undisclosed location in Odesa.

After Russia invaded Ukraine in February 2022, Karimi contacted Tereshchenko and sought the children's travel documents. Tereshchenko cooperated so that the children could leave Ukraine. He asked that the children be brought to him in Dubai, where he had a home, but Karimi instead took the children to Poland, the Netherlands, Spain, and ultimately on July 11, 2022, to the United States.

Karimi did not advise Tereshchenko where she had taken the children, but with the assistance of international authorities and then the U.S. Department of State, Tereshchenko located Karimi in New York City and filed this action on March 8, 2023. Karimi evaded service and resisted appearing in court. After an Order of May 26 allowed a process server to affix the pleadings to Karimi's apartment door, Karimi appeared at a conference on June 9.

Over the succeeding months, the parties attempted to mediate the petition, using the services of the court's Mediation Office, and then agreed to abide by a decision regarding custody to be issued by the District Court of the City of Odesa ("District Court"). The District Court issued its decision on November 21, ruling that the children are to reside with Tereshchenko. It noted that Karimi had repeatedly violated

the terms of a custody agreement that had been signed by the parents after their divorce. Although Karimi had agreed to abide by the District Court's decision, she refused to do so, changed counsel and continued her opposition to the petition.

A hearing was held on January 3, 2024, and at the conclusion of the hearing, the Court granted the petition. While Tereshchenko offered to take the children to reside with him in Ukraine, the Court ruled that Tereshchenko could take the children to France to reside with him at his home there.

Tereshchenko, 2024 WL 80427, at *8-10.

After the January 3 hearing, the parties were ordered to discuss how the children will be transferred to Tereshchenko's custody. Karimi has refused to produce the passports for the children, contending that they have been lost. On January 17, petitioner's counsel advised the Court that Tereshchenko will arrive in the United States on January 27 to pick up replacement travel documents for the children and travel with them to France shortly thereafter. He has invited Karimi to join him and the children as they travel to France and has offered to assist Karimi in procuring reasonable accommodations for her in France to allow a "seamless transition" and to give her meaningful access to her children.

On January 16, Karimi, represented by new counsel, requested a stay of proceedings to permit Karimi to file an

expedited appeal. Counsel represents that it will file its brief on appeal on January 31, and expects that the appeal will be fully briefed by the end of February 2024.

On January 17, respondent opposed the stay. At a conference on January 18, the Court denied the request for a stay. The reasons for that denial are set forth in this Opinion. The parties agreed at the conference that, absent a stay from the Court of Appeals, the petitioner will take physical custody of the children on January 28, and fly with them to France on or after Tuesday, January 30, 2024.

Discussion

Karimi seeks a stay of the January 8 Order in this Hague Convention proceeding pending her expedited appeal of the decision. To determine whether to issue a stay pending appeal, a court must consider

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

DiMartile v. Hochul, 80 F.4th 443, 456 (2d Cir. 2023) (citation omitted). “To satisfy the ‘success on the merits’ factor, the moving party must show that his chance of success on the merits is more than a ‘mere possibility.’” Id. (citation omitted).

"A stay pending appeal is not a matter of right." Id. While the first two of the four factors "are the most critical," "a stay is an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of discretion." New York v. U.S. Dep't. of Homeland Sec., 974 F.3d 210, 214 (2d Cir. 2020) (citation omitted).

"In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests." Chafin v. Chafin, 568 U.S. 165, 179 (2013). The Supreme Court has emphasized that district and appellate courts should take steps "to decide these cases as expeditiously as possible, for the sake of the children." Id. A stay of a court's decision under the Hague Convention is therefore not guaranteed, for such a guarantee would "undermine the goal of prompt return and the best interests of children who should in fact be returned." Id.

The respondent has not met her burden to show that a stay of the January 8 Order is justified. She has failed to show that any of the four factors weighs in favor of a stay.

Karimi first argues that her petition for a stay raises four serious questions of law that require review. This

misstates her burden. She must show that there is more than a “mere possibility” that a court will find for her on the merits for at least one of these questions. She has not met that burden with respect to any of her four legal questions.

The first question of law that Karimi identifies is whether this action was brought more than one year after removal, which would permit her to rely on the “now settled” defense. As the January 8 Order explains, the Court granted the petitioner’s motion in limine to strike this defense at the January 3 hearing because the petitioner had forfeited this defense to the petition and on the merits. The petitioner was prejudiced by the respondent’s failure to identify the now-settled defense until the eve of the hearing. Moreover, one year had not elapsed between the wrongful retention and the filing of this action, whether that is measured from the date by which Tereshchenko would have understood that Karimi was not bringing the children to Dubai, or from the date of their arrival in the United States. Tereshchenko, 2024 WL 80427, at *7.

The second legal issue that Karimi identifies is whether the Hague Convention permits a child to be returned to a parent in a third country, that is, a country other than the country that was the child’s habitual residence. The January 8 Order addresses this question in detail, reviewing the language in the Hague Convention, its drafting history, the opinion of the U.S.

State Department, and a ruling by a British court. Relying on this analysis, the January 8 Order held that the Hague Convention allows a child to be returned to a parent's current abode in a third country, rather than requiring the child to be returned to the country that was once the child's habitual residence but in which the parent no longer resides.

Tereshchenko, 2024 WL 80427, at *8-10. Karimi has not explained why this conclusion was in error. In any event, as explained in the January 8 Order, Tereshchenko had agreed to return to Ukraine if the Court required him to do so. Karimi has never suggested that she desires the children to return to Ukraine.

The third legal issue identified by Karimi is "whether a U.S. district court has jurisdiction to determine the travel rights of a parent, particularly when custody proceedings are ongoing and being actively litigated." Karimi has not shown a likelihood of succeeding with this argument on appeal. First of all, this argument was forfeited.¹ At no point before or during the January 3 hearing did Karimi make this argument. In any event, this Court has jurisdiction over this petition pursuant to the International Child Abduction Remedies Act ("ICARA"), 22

¹ "The term 'waiver' is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate." Carroll v. Trump, 88 F.4th 418, 422 n.1 (2d Cir. 2023) (citation omitted).

U.S.C. §§ 9001 et seq. The existence of ongoing custody proceedings does not bar a petitioner from pursuing his rights under the Hague Convention. The Convention protects a petitioner's "rights of custody" whether custody proceedings are ongoing or not. The Hague Convention provides recourse for the wrongful removal or retention of a child in violation of these "rights of custody." Hague Convention, Art. 3. See Ozaltin v. Ozaltin, 708 F.3d 355, 369 (2d Cir. 2013).

It is undisputed in this case that the "rights of custody" provided by Ukraine's Family Code give both parents the right to participate in the decision regarding where the children reside and the right to communicate with the children. Tereshchenko, 2024 WL 80427, at *4. And, as the parties agreed at the hearing, undisputed facts establish that Karimi breached Tereshchenko's "rights of custody" under Ukraine's Family Code. Id. As Karimi admitted at the hearing, she brought the children to the United States without informing Tereshchenko she was doing so and never informed him thereafter that she had done so. Only with the assistance of governmental authorities was Tereshchenko able to discover where they were.

The fourth legal question that Karimi lists is whether she was provided with any minimal procedural process that may be required in Hague Convention proceedings. For several reasons, this question does not suggest an issue on which she is likely

to prevail on appeal. Since she never complained about any defect in the process before or during the January 3 hearing, this argument has been forfeited. Moreover, the January 16 submission does not identify any process to which she may be referring. Finally, at each step of the proceedings Karimi has been given notice and an opportunity to be heard. She has retained at least ten attorneys to represent her over the course of these proceedings. And as the petitioner points out, neither discovery nor an evidentiary hearing is required by the Hague Convention, ICARA, or the Due Process Clause of the Fifth Amendment. West v. Dobrev, 735 F.3d 921, 929 (10th Cir. 2013), March v. Levine, 249 F.3d 462, 474-75 (6th Cir. 2001). Nonetheless, Karimi was afforded an evidentiary hearing on January 3.

The second factor Karimi must address is whether she will suffer irreparable harm absent a stay. Karimi argues that she and the children will face irreparable harm absent a stay because she and one of her children are in this country under the Uniting for Ukraine initiative and may not be able to return if they leave,² the children have a stable life in the United States, M.T. is receiving medical care here, and the children do not speak French. None of these constitutes irreparable harm.

² K.T. is an American citizen.

Karimi's own connection to the United States is limited. During the years following her divorce, she traveled widely across the globe and lived for over a year in London. While M.T. suffers from a hearing problem, fortunately there is no ongoing crisis in her health that requires constant medical treatment.³ As the doctor from the Mayo Clinic advised Karimi, M.T. may fly.

Tereshchenko has the financial resources to provide medical care for M.T. in Europe, as he has done in the past.

As additional support for her argument that there is irreparable harm, Karimi speculates that Tereshchenko may take the children to Dubai, which is not a signatory to the Hague Convention. This speculation does not constitute a showing of irreparable harm. Tereshchenko has participated and continues to participate in court proceedings in Ukraine addressed to the custody of his children. He is Ukrainian and travels internationally on business. He has a home in France. He has offered to help Karimi find accommodations there so that she can continue to have access to her children. There is no basis to find that Tereshchenko would take the children to Dubai and remain there in order to escape legal process.

³ As reflected in the medical records for M.T. from the Mayo Clinic and Weill Cornell, the doctors have attempted to reassure Karimi about M.T.'s condition.

To the contrary, it is Karimi who has already evaded legal process and disobeyed court orders. She abducted the children as soon as the Odesa Guardianship Decision gave custody to Tereshchenko. She evaded service of the instant petition. She purports to have lost her children's passports. She delayed these proceedings by agreeing to comply with the custody decision by the Odesa District Court, and when she lost in that court, changed counsel representing her here and reneged on her agreement.

As to the third factor, the respondent argues that the petitioner will not be substantially injured by a stay of the January 8 Order, as he is able to visit his children in the United States. This argument fails. He has already experienced substantial injury and will continue to experience it for so long as legal proceedings in this country last. Karimi abducted the children in November 2021. She has resisted Tereshchenko having unsupervised access to the children after he discovered them in New York in 2023. She has essentially deprived her children of their father and deprived Tereshchenko of his children for over two years.

Finally, the respondent argues that a stay of the January 8 Order weighs in favor of the public interest, as appellate review of the Order will ensure "consistent and accurate interpretation" of the Hague Convention. The public interest,

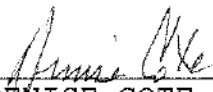
however, weighs very strongly against a stay. As the Supreme Court has explained, the Hague Convention generally requires “the ‘prompt return’ of a child.” Golan v. Saada, 596 U.S. 666, 670 (2022) (citing Hague Convention, Art. 1(a)). “This requirement ensures that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” Id. (citing Hague Convention, Art. 1(b)). American parents and their children benefit from this country’s participation in and vigorous enforcement of the Hague Convention. In 2022, 165 abducted children were returned to the United States pursuant to the Convention.⁴

⁴ U.S. Dep’t of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, April 2023, <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Annual%20Report-fv.pdf>

Conclusion

The respondent's January 16 request for a stay is denied except to the following extent. An administrative stay shall be issued for three days to permit the respondent to seek a stay from the Court of Appeals for the Second Circuit.

Dated: New York, New York
January 18, 2024



DENISE COTE
United States District Judge